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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1198

WARREN SPANNAUS, as
Attorney General, State of Minnesota,
Petitioner,

v.

THE UNITED STATES SECRETARY OF TRANSPORTATION;
ADMINISTRATOR OF THE FEDERAL RAILROAD
ADMINISTRATION; NATIONAL RAILROAD
PASSENGER CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NATIONAL RAILROAD PASSENGER CORPORATION

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The respondent National Railroad Passenger Corporation respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Tenth Circuit's opinion in this case reported at 608 F.2d 861. The bases of respondent's opposition are: (1) the decision below does not raise the question presented to

this Court by petitioner; (2) the question presented by petitioner is moot; and (3) the decision below—denying petitioner's request for a preliminary injunction and remanding the case to the District Court for further proceedings—is clearly correct and presents no question of federal law deserving of this Court's review.

Moreover, this Court has already determined that service on four of the six passenger train routes which are the subject of this action could be discontinued pending the possible filing of petitions for writs of certiorari to review the decisions of courts of appeals which had enjoined such discontinuance. Service on the National Limited route between New York City/Washington, D.C. and Kansas City, Missouri was discontinued on October 1, 1979, after the Chief Justice vacated an order entered in a separate action by the United States Court of Appeals for the District of Columbia enjoining the discontinuance of this service.[1] Later this Court denied a petition for reconsideration of the Chief Justice's order.[2] Service on three additional routes radiating from Chicago (the Floridian to Florida, the Lone Star to Texas, and the North Coast Hiawatha to Seattle) was discontinued after Justice White vacated an order entered in this action by the Court of Appeals for the Tenth Circuit staying the dissolution of a district court order which required continuance of service on these three routes.[3] This Court denied a petition for reconsideration of Justice White's order.[4] Subsequently the Court of

[1] *Civiletti v. Hall*, No. A-277 (Sept. 30, 1979).

[2] Order List, Oct. 9, 1979.

[3] *Amtrak v. Kansas*, No. A-291 (Oct. 8, 1979).

[4] Order List, Nov. 5, 1979.

Appeals heard argument on an expedited schedule and issued the decision which is challenged in this proceeding by petitioner. That decision remanded the case to the District Court for the District of Kansas where it remains pending with issues which are yet to be litigated. Thus, service over four of the routes petitioner sought to save through its motion for preliminary injunction has already been discontinued for some months with the implicit approval of this Court.[5]

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The sole question presented to this Court by petitioner is:

> Did the enactment by the Congress of the Amtrak Reorganization Act of 1979 [93 Stat. 537] [the "1979 Act"], absolve the United States Secretary of Transportation from his responsibility to comply with 42 U.S.C. § 4332 (1976 ed.) [the National Environmental Policy Act or "NEPA"] in developing a recommendation for the restructuring of the nationwide basic route system of Amtrak pursuant to the Amtrak Improvement Act of 1978 [92 Stat. 923]?

The decision of the Court of Appeals did not turn on the above question but rather turned on an elementary

[5] A fifth route, the San Joaquin between Oakland and Bakersfield, California, has been continued by Amtrak under a contract with the State of California. The sixth, the Hilltopper between Washington, D.C., and Tri-State, Kentucky, was discontinued on October 1, 1979.

question of statutory construction, *i.e.*, whether the new Amtrak basic system is founded upon the recommendations of the Secretary or upon the definition of the basic system in section 104 of the 1979 Act. Pub. L. No. 96-73, 93 Stat. 538. After reviewing carefully the background of the 1979 Act, the Court of Appeals found that the language of Section 104 and its legislative history indicated clearly that Congress rejected the Secretary's recommendations and created its own statutory route structure. 608 F.2d at 865. No decision was made by the Court of Appeals regarding the Secretary's duties under NEPA; indeed, no question of interpretation or application of NEPA was involved, and NEPA remains unthreatened. The decision of the Court of Appeals does not limit the application of NEPA since that act obviously does not either by its terms or by implication restrict the power of Congress to enact new laws. In effect, the Court of Appeals decided that Congress intended to fashion the new Amtrak route system through legislation and not through the administrative process by which the Secretary's recommendations were developed. Any failure on the part of the Secretary to comply with NEPA procedural requirements in preparation of *his* recommendations became wholly irrelevant once Congress determined it would itself redefine Amtrak's basic system and would do so through the affirmative legislative provisions of the 1979 Act.

II. THE QUESTION PRESENTED BY PETITIONER IS MOOT.

If a court were now to require the Secretary to prepare a new report because of alleged procedural defects, a recommendation for inclusion of trains previously discontinued could not serve to reinstate them in the Amtrak basic route system. By virtue of Section 104

of the 1979 Act, that system includes only routes previously "*approved by the Congress*" or operated in accordance with other provisions of law. Congress specifically indicated in the 1979 Act and its legislative history the routes which it intended to be continued, and it authorized funding only for those routes. New recommendations by the Secretary would not change this statutorily prescribed route system. Resolution of the question presented by petitioner would therefore involve this Court in a futile exercise.

III. THE DECISION OF THE COURT OF APPEALS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Since the decision of the Court of Appeals in no way limits the general applicability of NEPA, there is no important federal question for this Court to decide in this case. The loss of train service by many communities under the new statutory route system is not itself grounds for judicial review. As stated by this Court in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978):

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

437 U.S. at 194-95.

Petitioner mistakenly views this case as reflecting an application of the doctrine of implied repeal. (Petition at 16). That doctrine was expressly excluded by the

Court of Appeals as a basis for its decision. The Court's opinion states:

> The whole of this legislative process persuades us that Congress did not leave designing of the passenger system to the Secretary and the appellees' subsequent actions, with further deliberations and administrative procedures under the environmental and other statutes. We feel we have no problem of mere implied repeal of the procedural provisions of NEPA . . . but a direct Congressional decision designing the basic rail system, without the necessity of following those procedures.

608 F.2d at 866.

In any event, the decision of the Court of Appeals is not inconsistent with the decisions of this Court with respect to implied repeal. In *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978), this Court upheld the validity of the Endangered Species Act and halted (temporarily) construction of the Tellico Dam notwithstanding appropriation by the Congress of construction funds. In effect, this Court ruled that enactment of appropriations measures would not repeal by implication a prior statute which prohibited the expenditure. 437 U.S. at 190. But this case does not involve any issue so difficult as the interrelationship of appropriations legislation and other statutes. Rather, the petitioner's appeal was founded on alleged NEPA procedural defects in the Secretary's route recommendations—mere administrative action—which have now been supplanted by positive legislative directions of the 1979 Act establishing the Amtrak route system. Clearly, testing the validity of the 1979 Act on the basis of conformity of the Secretary's recommendations with NEPA procedures would be absurd. Such a test would cause the legislative process to grind to a halt by permitting the invalidation of

legislation merely because members of Congress failed to discover and correct alleged administrative errors made in government agencies' recommendations on pending bills.

Since Section 104 of the 1979 Act applies to a very specific situation, its validity must be upheld if it conflicts with a statute of general application. As stated by this Court in *Morton v. Mancari,* 417 U.S. 535 (1974), "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . .," 417 U.S. at 551. Moreover, this principle has been applied by this Court to uphold the validity of a specific statute in the face of inconsistency with NEPA. In *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776 (1976), this Court stated, "NEPA was not intended to repeal by implication any other statute." 426 U.S. at 789. Clearly, even if Section 104 of the 1979 Act conflicted with NEPA—and no such conflict is apparent—the decision of the Court of Appeals would still be correct.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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